SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 494

FRED WAYNE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT.

I.

The opinion in the Circuit Court of Appeals has not been officially reported at the time of filing of this brief. The opinion is that of the Circuit Court of Appeals of the Eighth Circuit, and is dated and was filed on the 6th day of October, 1943, the opinion appearing in the transcript of the record (R. 36).

II.

The date of the opinion of the Circuit Court of Appeals is October 6th, 1943. Petition for rehearing was denied November 4th, 1943 (R. 44). This petition was filed within the thirty day period provided by the order withholding the issuance of the mandate (R. 45) and as provided by Rule XI of the Rules of Practice and Procedure as promulgated by this Court.

III.

The specific claim advanced by the Petitioner herein is that the Circuit Court of Appeals for the Eighth Circuit erred in holding that no proof of the intoxicating quality of beer is required under a mandate charging a violation of Section 2139 Revised Statutes. This ruling, petitioner asserts, is in conflict with an applicable decision of this Court:

United States of America v. *Standard Brewery,* 251 U. S. 210, 64 L. Ed. 229, 40 S. C. R. 139.

IV.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Congress of February 13, 1935, U. S. C. A., Title 28, Section 347.

Statement.

Petitioner is charged with violating Section 2139 Revised Statutes as amended, by selling to one certain Indian ward of the United States of America bottles and glasses of beer (R. 1).

The portion of the statute material here is in words as follows:

> "Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian ward of the Government—".

The proof of the character of the things sold was limited to the introduction of twelve bottles containing BEER, (Exhibits 1 to 12, inclusive) (R. 23) and a stipulation that the twelve bottles contained BEER (R. 24).

Upon appeal it was urged that the proof was insufficient for failure to establish that the beer in question was in fact intoxicating.

The Circuit Court of Appeals for the Eighth Circuit in the exercise of its discretion in the absence of the motion below, ruled that beer is intoxicating as a matter of common knowledge, and that such intoxicating quality required no proof (R. 39).

Upon petition for rehearing the point was again urged and the apparent conflict with the *United States of America* v. *Standard Brewery Company*, 251 U. S. 210, 64 L. Ed. 229, 40 S. C. R. 139 was called to the attention of that Court (R. 42).

Final decision was entered in the Circuit Court of Appeals on the 4th day of November, 1943 (R. 44).

The mandate was withheld pursuant to petition by order entered on the 4th day of November, 1943 (R. 45).

Points and Authorities.

The proof is here limited to sales of beer by name only (Exhibits 1 to 12, inclusive) (R. 23), stipulation (R. 24). The point urged upon appeal was that under the statute (Section 2139 R. S.) the proof must establish as a matter of fact that the beer sold was intoxicating, which was disposed of by the Circuit Court of Appeals by defining beer as an intoxicating malt liquor (R. 39).

This decision appears to ignore the principles announced by this Court that a statute should be construed according to the purpose for which it was passed and the language employed. It necessarily rejects the qualifying words appearing in the statute, "other intoxicating liquor" and "which produces intoxication", contrary to the rule of construction announced in the *United States of America* v. *Standard Brewery Company*, 251 U. S. 210, 64 L. Ed. 229,

40 S. C. R. 139. There two indictments were held insufficient because of failure to allege that the beer manufactured was, in fact, intoxicating, this under a statute forbidding the use of grains and other food products in the manufacture or production of beer, wine or other intoxicating malt or vinous liquors for beverage purposes.

It would seem that the failure of proof here is as conclusive as the failure to allege there. The paramount question under both statutes is whether or not the beer was intoxicating, in fact.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, and that a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Eighth Circuit, and finally reverse the same.

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